

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 32**

**PORTS AMERICA OUTER HARBOR, LLC, CURRENTLY  
KNOWN AS OUTER HARBOR TERMINAL, LLC  
and/or PORTS AMERICA OUTER HARBOR, LLC, CURRENTLY  
KNOWN AS OUTER HARBOR TERMINAL, LLC, AND  
MTC HOLDINGS, INC. AND ITS AFFILIATES AND  
SUBSIDIARIES, INCLUDING BUT NOT LIMITED TO  
MARINE TERMINALS CORPORATION, A SINGLE-EMPLOYER**

**and**

**Case 32-CA-110280**

**INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE WORKERS,  
DISTRICT LODGE 190, EAST BAY  
AUTOMOTIVE MACHINISTS LODGE  
NO. 1546, INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE WORKERS,  
AFL-CIO/CLC**

**INTERNATIONAL LONGSHORE  
AND WAREHOUSE UNION**

**and**

**Case 32-CB-118735**

**INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE WORKERS,  
DISTRICT LODGE 190, EAST BAY  
AUTOMOTIVE MACHINISTS LODGE  
NO. 1546, INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE WORKERS,  
AFL-CIO/CLC**

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF REGARDING  
PMMC-PCMC SINGLE-EMPLOYER STIPULATION**

## I. BACKGROUND

As set forth in the Amended Consolidated Complaint, the central issues in these cases are: (1) whether Respondent Ports American Outer Harbor, currently known as Outer Harbor Terminal, LLC (PAOH) and/or PAOH and MTC Holdings, Inc. (MTCH) and its affiliates and subsidiaries, including but not limited to Marine Terminals Corporation (MTC), acting as a single-employer (Single-Employer PAOH/MTC) is a *Burns* successor in a unit of maintenance and repair mechanics working at Berths 20 through 26 at the Port of Oakland (M&R Unit) when it took over that work in July 2013; (2) whether as a *Burns* successor PAOH and/or Single-Employer PAOH/MTC was obligated at the time of takeover to recognize the International Association Of Machinists and Aerospace Workers, District Lodge 190, East Bay Automotive Machinists Lodge No. 1546, International Association of Machinists and Aerospace Workers, AFL-CIO/CLC (IAM) as the proper collective-bargaining representative of those mechanics instead of the incumbent union International Longshore Workers Union (ILWU); and (3) whether POAH and/or Single-Employer PAOH/MTC is also a *Golden State* successor liable to remedy the many unfair labor practices that predecessor employer PCMC/PMMC had engaged in with respect to the Berths 20-26 mechanics prior to July 2013.<sup>1</sup>

The representational status of the M&R Unit when PAOH and/or Single-Employer PAOH/MTC took over that work in July 2013 is established by the Board's Decision and Order in *PCMC/Pacific Crane Maintenance Company, Inc. and/or Pacific Marine Maintenance Co., LLC, a single employer, and/or PCMC/Pacific Crane Maintenance Company, LP, their*

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<sup>1</sup> The corresponding allegations against ILWU involve its acceptance of recognition from PAOH and/or Single-Employer PAOH/MTC as the representative of the maintenance and repair mechanics working at Berths 20-26 and its continued application of its master contract to those employees.

*successor*, 362 NLRB No. 120 (2015), in which the Board affirmed the Administrative Law Judge's rulings, findings, and conclusions of law and adopted his recommended Order only to the extent consistent with the Board's earlier Decision and Order in *PCMC/Pacific Crane Maintenance Company, Inc. and/or Pacific Marine Maintenance Co., LLC, a single employer, and/or PCMC/Pacific Crane Maintenance Company, LP, their successor*, 359 NLRB No. 136 (2013) (herein referred to as the PCMC/PMMC Case).

The Board's decision in the PCMC/PMMC Case establishes that the IAM represented the M&R Unit at Berths 20-24 when PAOH and/or Single-Employer PAOH/MTC took over the work in July 2013. The foundational facts underlying the representational status of the M&R Unit, as they were found by the Board in the PCMC/PMMC Case, are factually pled in paragraphs 6 and 18 of the Amended Consolidated Complaint issued in this case. Respondents PAOH, MTC/MTCH and ILWU have each denied those paragraphs in their answers to the Amended Consolidated Complaint.

On October 19, 2015, Administrative Law Judge Mary Cracraft granted Counsel for the General Counsel's motion to take administrative notice of the PCMC/PMMC Case in this matter. (Tr. 30-31) Counsel for the General Counsel offered this case to support the foundational facts set forth in paragraphs 6 and 18 of the Amended Consolidated Complaint.

On April 11, 2016, during the hearing in the above-referenced matter, Counsel for Respondents MTC and MTCH (Respondent MTC/MTCH) announced that Respondent MTC/MTCH would not accept the stipulation in the prior proceeding as to the single-employer status of PMMC and PCMC and asserted that Counsel for the General Counsel should be expected to put on evidence to establish that PMMC and PCMC were in fact a single-employer.

(Tr. 903-905)<sup>2</sup> On April 12, 2016, ALJ Cracraft invited the parties to brief the issue raised by Respondent MTC. (Tr. 1001-1002) On April 22, 2016, Respondents MTC/MTCH and ILWU filed briefs regarding the single-employer stipulation in the PCMC/PMMC case. Counsel for the General Counsel files this brief in response the issue raised by Respondent MTC/MTCH.

## II. ANALYSIS

The Board's decision in the PMMC/PCMC Case is binding on the decision in this case. It is well established that a judge is bound to apply established Board precedent which neither the Board nor the Supreme Court has reversed, notwithstanding contrary decisions by courts of appeals. See, e.g., *Pathmark Stores, Inc.*, 342 NLRB 378 n. 1 (2004); *Waco, Inc.*, 273 NLRB 746, 749 n. 14 (1984); *Los Angeles New Hospital*, 244 NLRB 960, 962 n. 4 (1979), enfd. 640 F.2d 1017 (9th Cir. 1981); and *Iowa Beef Packers*, 144 NLRB 615, 616 (1963), enfd. in part 331 F.2d 176 (8th Cir. 1964). By its own terms, the all-party stipulation that PMMC and PCMC operated as a single-employer made in the PMMC/PCMC Case is binding as to that litigation. See Exhibit A to Respondent ILWU's April 22 Brief). The Board's finding that the IAM represented the M&R Unit relies on that stipulation and is binding on the decision in this case.

Aside from its relevance in the PMMC/PCMC Case and the impact that the stipulation had on the Board's decision in that case, the nature of the relationship between PMMC and PCMC in 2005 is not an issue in this case and not relevant to a finding that PAOH and/or Single-Employer PAOH/MTC is a *Burns* and/or *Golden State* successor to the M&R Unit when in 2013 it took over the work that was the subject of the Board's decision in the PMMC/PCMC Case. The PMMC/PCMC single-employer stipulation is relevant only to the Board's decision in the

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<sup>2</sup> References to the hearing transcript in this matter are noted as Tr. followed by the page number.

PMMC/PCMC Case and it is binding on the parties in that case, including Respondent ILWU.

While tangentially involved as a part owner of PMMC, Respondent MTC/MTCH was not a party to the PMMC/PCMC Case or the stipulation agreed to by the parties in that case. As such, Respondent MTC/MTCH has no standing to challenge the stipulation made therein or to appeal the Board's decision in that case which relied on the stipulation.<sup>3</sup>

Respondent MTC/MTCH's argument that it is not bound by the single-employer stipulation in the PMMC/PCMC Case and its attempts to force the litigation of the factual basis for the stipulation from the prior case do not raise any legitimate issues and is plainly a subterfuge to collaterally attack the decision in that case. The primary issue here is whether the Board's decision in the PMMC/PCMC Case determined that the IAM represents the M&R Unit at Berths 20-24 as of July 2103 and the answer to that issue is clearly yes. On this, at the conclusion of its April 22 brief, even Respondent MTC/MTCH offers a passing acknowledgement of the fact that the Board's decision in the PMMC/PCMC decision is binding on that issue. (Respondent MTC/MTCH's April 22 Brief at page 8-9). However, the basis articulated by Counsel for Respondent MTC/MTCH in raising this issue is to force Counsel for the General Counsel to litigate the stipulation in an effort to undermine a pivotal basis for the decision in the PMMC/PCMC Case. (Tr. 903-905). Moreover, in its April 22 brief, Respondent MTC/MTCH states unequivocally: "it is the position of MTC and MTCH that the conclusion of

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<sup>3</sup> While Respondent MTC/MTCH may now disagree with the stipulation and seek to escape the repercussions of the stipulation in the prior case, one could argue that since Respondent MTC/MTCH was a partial owner of PMMC and responsible to pay 42.5% of PMMC's liability under the PMMC/PCMC Case, it is privy to the stipulation and bound to that stipulation as the minority constituent member of PMMC, which executed the stipulation. Indeed, MTC's President and CEO at the time the stipulation was entered into, Douglas Tilden, testified in this case that he was aware of the stipulation around the time that it was made and believed that the stipulation was in the best interest of MTC. (Tr. 491; 538-539; 548-553) However, it is unnecessary to reach this issue as the decision in this case is bound by the Board's decision in the PMMC/PCMC Case, which properly relied upon the parties' stipulation of PMMC's and PCMC's single-employer status.

the PCMC Case, that [PMMC] and PCMC had a bargaining obligation with the IAM commencing in 2005, and that they unlawfully refused to recognize the IAM, is not binding on the parties in this case.” (Resp. MTC Brief at page 2). It is wholly contrary to the fundamental structure of Board law and the ALJ’s authority to allow the parties in this case to litigate matters that were at issue in and decided by the Board in the PMMC/PCMC case. Moreover, it would be wholly inappropriate to require Counsel for the General Counsel to prove facts to support a stipulation from a prior case that is binding in that litigation and which is really only relevant to the instant case because it was relied upon by the Board in making its decision in the PMMC/PCMC Case, a decision which is binding on the decision in this case.

Respondent MTC/MTCH attempts to frame its improper attack on the Board’s decision in the PMMC/PCMC Case as the “General Counsel’s novel attempt to use collateral estoppel to automatically establish elements of its new case against MTC and MTCH.” (Resp. MTC Brief at page 4). As noted above, Counsel for the General Counsel is not relying on collateral estoppel and is not seeking to prove the facts of the PMMC/PCMC Case, but is instead properly relying upon the binding precedent of that Board decision to set the foundational background of the unfair labor practices alleged in this case. Respondent MTC/MTCH’s citations to collateral estoppel cases are therefore inapposite in this case. In those cases, parties are involved in actively litigating issues that had been previously addressed in a prior proceeding. For example, in *Spurlino Materials*, 357 NLRB No. 126 (2011) an ALJ permitted the litigation of the single-employer status of two entities which had been essentially admitted to be single-employers in a prior case, when one of the entities failed to deny prior complaint’s jurisdictional description of the employer as operating a facility operated by the second entity. Since the single-employer

status of the two entities was actively alleged in the new complaint issued against both entities, and one of the entities had not been a party to the prior case, the ALJ permitted litigation of the single-employer issue in the new case. This is factually distinguishable from the instant case. Here, Respondent PAOH and Respondent MTC/MTCH are alleged to be single-employers and are alleged to have committed unfair labor practices when they took over the M&R Unit in 2013. PMMC and PCMC are not parties to this matter and the status of their relationship is neither relevant nor necessary to a determination of the unfair labor practices in this case. Counsel for the General Counsel need not establish that PMMC and PCMC are single-employers in this case to reach the conclusion that Respondent PAOH and/or Single-Employer PAOH/MTC are successors to the bargaining obligations found in the PMMC/PCMC Case. As such, the findings in *Spurlino Materials* and other collateral estoppel cases cited by Respondent MTC/MTCH have no bearing on this matter and are factually distinguishable from the procedural posture of this case. Here, there is simply no basis to permit, nor legal authority to require, litigation of the single-employer relationship between PMMC and PCMC in 2005, which has no bearing on the unfair labor practices alleged in this case aside from the Board's reliance on the stipulation regarding the matter in its decision in the PMMC/PCMC Case.

Finally, notwithstanding the fact that litigating the stipulation of the prior case is unnecessary and wholly improper here, it would also be virtually impossible to litigate the nature of the relationship between PMMC and PCMC in 2005 in this case. Neither entity is a party to this litigation, neither appears to have any presence in Oakland, and it is unclear whether PMMC even continues to exist at this point in time. As such, allowing the litigation of the

PMMC/PCMC single-employer stipulation would be both improper and impractical in the circumstances of this case.

### **III. CONCLUSION**

For all of these reasons, Respondent MTC/MTCH's efforts to force Counsel for the General Counsel to litigate and prove an all-party stipulation at issue in the predecessor case should be rejected.

**DATED AT** Oakland, California this 28<sup>th</sup> day of April 2016.

/s/ Amy Berbower

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